

<div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: left;"> MAIL STOP APPEAL BRIEF-PATENTS <small>NOV 21 2005</small> <small>PTENT & TRADEMARK SERVICE</small> </div> <div style="text-align: center;"> FEE TRANSMITTAL For FY 2005 </div> </div>				Complete If Known			
<input type="checkbox"/> Applicant claims small entity status. See 37 CFR 1.27				Application No.	10/020,136		
Total Amount Of Payment (\$)				Filing Date	December 18, 2001		
METHOD OF PAYMENT (check all that apply)				First Named Inventor	Stephen W. Comiskey		
				Examiner Name	Sue A. Purvis		
<input checked="" type="checkbox"/> Check <input type="checkbox"/> Credit Card <input type="checkbox"/> Money Order <input type="checkbox"/> None <input type="checkbox"/> Other (identify): _____				Art Unit	1734		
<input checked="" type="checkbox"/> Deposit Account Deposit Account Number 50-0206 Deposit Account Name: Hunton & Williams LLP				Attorney Docket No.	53326.000012		
For the above-identified deposit account, the Director is hereby authorized to: (check all that apply)							
<input type="checkbox"/> Charge fee(s) indicated below. <input type="checkbox"/> Charge fee(s) indicated below, except for the filing fee							
<input checked="" type="checkbox"/> Charge any additional fee(s) or underpayments of fee(s) under 37 CFR 1.16 and 1.17 <input type="checkbox"/> Credit any overpayments.							
FEE CALCULATION							
1. BASIC FILING, SEARCH AND EXAMINATION FEES							
		FILING FEES		SEARCH FEES		EXAMINATION FEES	
<u>Application Type</u>	<u>Fee(\$)</u>	<u>Small Entity Fee (\$)</u>	<u>Fee(\$)</u>	<u>Small Entity Fee (\$)</u>	<u>Fee(\$)</u>	<u>Small Entity Fee (\$)</u>	<u>Fees Paid (\$)</u>
Utility	300.00	150.00	500.00	250.00	200.00	100.00	
Design	200.00	100.00	100.00	50.00	130.00	65.00	
Plant	200.00	100.00	300.00	150.00	160.00	80.00	
Reissue	300.00	150.00	500.00	250.00	600.00	300.00	
Provisional	200.00	100.00	0.00	0.00	0.00	0.00	
2. EXCESS CLAIMS FEES							
<u>For</u>	<u>Number Present</u>	<u>Highest Number Paid For</u>	<u>Extra</u>	<u>Fees (\$)</u>	<u>Small Entity Fee (\$)</u>	<u>Fees Paid (\$)</u>	
Total Claims		20	0 x	50.00	25.00		
Independent Claims		3	0 x	200.00	100.00		
Multiple Dependent Claim				360.00	180.00		
Total Excess Claims Fees							
3. APPLICATION SIZE FEE (if the specification and drawings exceed 100 sheets of paper, the application size fee due is \$250 (\$125 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s).							
<u>Total Sheets</u>	<u>Extra Sheets</u>	<u>No. of Each Additional 50 or Fraction Thereof</u>	<u>Fees (\$)</u>	<u>Small Entity Fee (\$)</u>	<u>Fees Paid (\$)</u>		
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4. OTHER FEE(S)							
<input type="checkbox"/> Surcharge - late filing fee or oath <input type="checkbox"/> Design Issue Fee							
<input type="checkbox"/> Surcharge - late provisional filing fee or cover sheet <input type="checkbox"/> Plant Issue Fee							
<input type="checkbox"/> _____ Month Extension of Time <input type="checkbox"/> Petition to Commissioner							
<input type="checkbox"/> Submission of Information Disclosure Statement <input type="checkbox"/> Petition to Revive (Unavoidable)							
<input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Petition to Revive (Unintentional)							
<input type="checkbox"/> Request for Oral Hearing <input type="checkbox"/> Petitions Related to Provisional Applications							
<input checked="" type="checkbox"/> Filing Brief in Support of Appeal 250.00 <input type="checkbox"/> Recording Each Patent Assignment Per Property							
<input type="checkbox"/> Filing Submission After Final Rejection <input type="checkbox"/> Other (specify) _____							
SUBMITTED BY							
Signature				Registration No.	44,487	Telephone	202-955-1500
Typed or Printed Name		Yisun Song		Date	November 21, 2005		

A circular black ink stamp from the OIPE IAP38 Patent & Trademark Office. The text "OIPE IAP38" is curved along the top inner edge, and "PATENT & TRADEMARK OFFICE" is curved along the bottom inner edge. In the center, the date "NOV 21 2005" is stamped horizontally. The stamp is partially overlapping the bottom of the page.

Attorney Docket No. 53326.000012

Confirmation No. 9781

TC/A.U.: 1734

Examiner: Sue A. Purvis

Customer No. 21967

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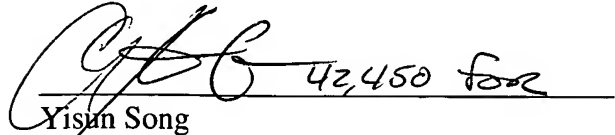
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Respectfully submitted,

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Dated: November 21, 2005

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Patent Application of:)	Attorney Docket No. 53326.000012
)	
Stephen W. Comiskey et al.)	Confirmation No. 9781
)	
Application Number: 10/020,136)	TC/A.U.: 1734
)	
Filed: December 18, 2001)	Examiner: Sue A. Purvis
)	
)	Customer No. 21967
For: REFLECTED LIGHT GLARE MINIMIZATION FOR ATHLETIC CONTEST PARTICIPANTS WHILE PROVIDING A NON-VERBAL COMMUNICATION		

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Alexandria, VA 22313-1450a

APPEAL BRIEF

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APPEAL BRIEF

Appellants' Appeal Brief in connection with the above-captioned patent application is hereby submitted. A check for the requisite fee in accordance with 37 C.F.R. § 1.17(c) is enclosed. A Notice of Appeal was submitted on September 21, 2005. It is respectfully submitted that this Appeal Brief is timely filed. Each item required by 37 C.F.R. § 41.37 is set forth below. Appellants believe that no additional fees are deemed necessary, however if there are any deficiencies, please charge the undersigned's Deposit Account No. 50-0206.

In response to the Office Action dated June 21, 2005, rejecting pending claims 21-40, Appellants respectfully request that the Board of Patent Appeals and Interferences reconsider and withdraw the rejection of record, and allow the pending claims, which are attached hereto as Appendix A.

I. REAL PARTY IN INTEREST

The real party in interest is Stephen W. Comiskey, a named inventor of the above-referenced application.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences.

III. STATUS OF CLAIMS

Claims 21-40 are pending in the application. The rejections of each of claims 21-40 are appealed.

IV. STATUS OF AMENDMENTS

No amendments to the claims have been filed subsequent to the rejection dated August 22, 2005.

V. SUMMARY OF CLAIMED SUBJECT MATTER

A. Summary of the Invention

An exemplary embodiment of the claimed invention is directed to reducing reflected light glare into a human's eyes from the human's cheeks while simultaneously providing non-verbal communication to others (Abstract). A non-toxic, non-reflective colored and finished material in the form of a predefined clearly demarcated geometric shape may be applied underneath the eye's on the cheeks [0020]. The shape preferably is a logo, team name and/or mascot, for example [0020]. According to an embodiment of the present invention, a shape may be formed within a surrounding background having predefined clearly demarcated edges within the shape demarcated from the surrounding black or dark colored area by lines, where the lines preferably are a dull or matte color and clearly contrast the non-reflective color [0029] FIG. 7.

B. Embodiments of the Claimed Invention

As recited in independent claim 21, a method of reducing reflected light glare into a human's eyes from the human's cheeks comprises the steps of applying underneath the human's eyes, on the human's cheeks, generally covering a location at which incident direct or indirect light is likely to be reflected in the human's eyes, a non-toxic material having a non-reflective colored and finished exterior surface having a wavelength falling outside of the range of wavelengths between 430 nm and 690 nm, and a shape formed within the exterior surface, wherein the shape has a color contrasting to the non-reflective color and is configured to provide communication, and wherein the non-toxic material comprises one of a decal and a temporary tattoo; and removing the non-reflective material within a week after application of the non-reflective material.

As recited in independent claim 31, a method of reducing reflected light glare into a human's eyes from the human's cheeks comprises the steps of applying underneath the human's eyes, on the human's cheeks, generally covering a location at which incident direct or indirect light is likely to be reflected in the human's eyes, a non-toxic material having a non-reflective colored and finished exterior surface having a wavelength falling outside of the range of wavelengths between 430 nm and 690 nm, and a shape or shapes bounded by an exterior boundary or boundaries, or an interior boundary or boundaries, or both, wherein the exterior boundary or boundaries, or the interior boundary or boundaries, or both, is or are configured to provide communication, and wherein the non-toxic material comprises one of a decal and a temporary tattoo; and removing the non-reflective material within a week after application of the non-reflective material.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The issues on appeal are as follows.

A. Whether claims 21-24 and 31-34 are unpatentable under 35 U.S.C. § 103(a) over U.S. Patent No. 4,719,909 to Micchia *et al* (“Micchia”) in view of U.S. Patent No. 1,300,592 to Essig (“Essig”).

B. Whether claims 26-30 and 36-40 are unpatentable under 35 U.S.C. § 103(a) over Micchia in view of Essig and further in view of US Patent No. 5,470,351 to Ross *et al* (“Ross”).

C. Whether claims 25 and 35 are unpatentable under 35 U.S.C. § 103(a) over Micchia in view of Essig and further in view of Ross and US Patent No. 4,522,864 to Humason *et al* (“Humason”).

None of the claims stand or fall together. The reasons why each claim is separately patentable are presented in the Arguments section below.

VII. ARGUMENTS

The rejections against the pending claims under consideration in the above-captioned patent application should be reversed for at least the reasons set forth below.

A. Brief Description of the Art Applied to the Claims

Micchia

Micchia appears to disclose an under-eye light absorbing with a light absorbing replaceable sheet material patch attachable by pressure sensitive adhesive. Micchia specifically discloses a non-reflective, such as black, hypo-allergenic coating uniformly applied over the surface of the body sheet. 11 (col. 2, lines 37-45).

Essig

Essig appears to disclose a beauty mark supplied with perfume in such a manner that the perfume will be released while the article is being worn and subjected to the heat and moisture of the body (col. 1, lines 9-17). The beauty mark construction is made for suitable surface ornamentation and in which the materials used for applying the ornamentation include perfume retaining means adapted to release the perfume (col. 1, lines 18-25).

Ross

Ross appears to disclose a method and device for creating a suntan tattoo, which includes cutting an appliqué from a two-ply blank formed of a flexible film sheet and a backing sheet. The flexible film has an adhesive coating on one side and excess film is removed from the backing sheet (Abstract).

Humason

Humason appears to disclose a decal having a multi-color offset printed design on an extremely thin, flexible, extensible film of water resistant material covering a water soluble slip layer carried by porous decal paper and a uniform deposit of pressure sensitive adhesive covering the design and adapted to hold the design against skin and protect it from disruption during application to a skin surface (Abstract).

The applied references all fail to show or obviate the combination of claim limitations, as recited by Appellants.

B. Summary of Argument

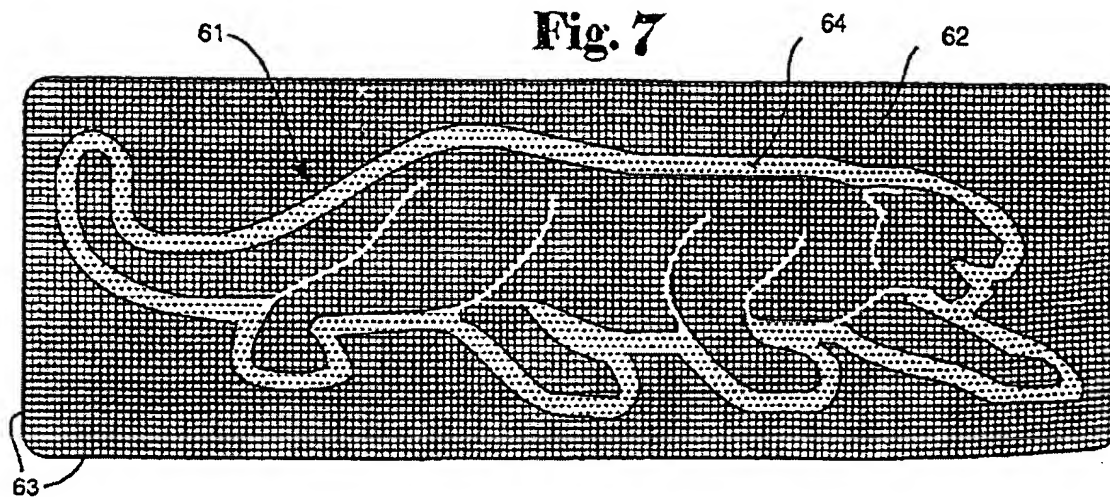
Claims 21-24 and 31-34 are improperly rejected under 35 U.S.C. § 103(a) by Micchia in view of Essig because the Office Action fails to set forth a *prima facie* case of obviousness. In particular, the combination of Micchia and Essig fails to show the claimed inventions.

Claims 26-30 and 36-40 are improperly rejected under 35 U.S.C. § 103(a) by Micchia in view of Essig and further in view of Ross because the Office Action fails to set forth a *prima facie* case of obviousness. In particular, the combination of Micchia and Essig in view of Ross fails to show the claimed inventions.

Claims 25 and 35 are improperly rejected under 35 U.S.C. § 103(a) by Micchia in view of Essig and further in view of Ross and Humason because the Office Action fails to set forth a *prima facie* case of obviousness. In particular, the combination of Micchia and Essig in view of Ross and Humason fails to show the claimed inventions.

C. Independent Claim 21 is Patentable Over Micchia in view of Essig under 35 U.S.C. § 103(a)

An exemplary embodiment of the claimed invention is shown in Figure 7 of the instant patent application. Independent claim 21 recites “a non-toxic material having a non-reflective colored and finished exterior surface having a wavelength falling outside of the range of wavelengths between 430 nm and 690 nm, and a shape formed within the exterior surface, wherein the shape has a color contrasting to the non-reflective color and is configured to provide communication.” Referring to the exemplary embodiment shown in Figure 7, a shape (*e.g.*, panther) is formed within the exterior surface (*e.g.*, 64), wherein the shape (*e.g.*, panther) has a color contrasting to the non-reflective color (*e.g.*, 62) and is configured to provide communication (*e.g.*, team mascot).



These limitations are admittedly missing from Micchia and are not taught by the disclosure of Essig. More specifically, Essig simply refers to an ornamental design and fails to show “a shape formed within the exterior surface” and further fails to show the shape having “a color contrasting to the non-reflective color” and that the shape “is configured to provide communication.”

The Examiner acknowledges that Micchia does not disclose that the decal also comprises a shape formed within the exterior surface which has a color contrasting to the non-reflective color and is configured to provide communication (Office Action mailed 6/21/05, page 3 and Advisory Action mailed 9/13/05, page 2). For these major deficiencies, the Office Action applies Essig which discloses a decorative “beauty mark” that releases perfume while the article is being worn and subjected to heat and moisture of the body (Essig, col. 1, lines 9-17).

Essig fails to show the admitted missing limitations, namely “a shape formed within the exterior surface, wherein the shape has a color contrasting to the non-reflective color and is configured to provide communication.” It is the Examiner’s position that “the ornamental material contrasts sufficiently to meet the claim limitation and provides a form of

communication.” (page 2, Advisory Action mailed 9/13/05). This is simply untrue. The Examiner has failed to identify the “exterior surface” within the ornamental design of Essig. The Examiner has also failed to identify a “shape formed within the exterior surface” within the ornamental design of Essig. The Examiner has also failed to identify that the “shape has a color contrasting to the non-reflective color.” The Examiner merely identifies a partial ornamental material 14 (*i.e.*, a decorative circle within the butterfly image) and concludes that the ornamental material “contrasts sufficiently to meet the claim limitation.” (Advisory Action mailed 9/13/05, page 2). However, the Examiner has failed to explain how the decorative circle 14 within the butterfly image of Essig meets the limitation reciting “a shape formed within the exterior surface, wherein the shape has a color contrasting to the non-reflective color and is configured to provide communication.”

A major difference between the ornamental design of Essig and the claimed invention is that the shape is formed within the exterior surface in the claimed invention. As detailed in the specification, the embodiment of Figure 7 is typically more functional than the embodiment of Figure 6 since the surrounding area 62 can be dimensioned for optimum functionality for minimizing light reflection into the user’s eyes, whereas the mascot shape per se may or may not properly cover the appropriate reflective portion of the cheeks. (specification, page 12, lines 5-10). This feature is clearly missing from the ornamental design of Essig.

The Office Action alleges that the beauty mark “communicates to the viewer an image of a butterfly” (Office Action mailed 6/21/05, page 4). Contrary to the Office Action’s allegations, the beauty mark of Essig is purely decorative and fails to provide communication. Essig describes the invention as being made for “suitable surface ornamentation.” The Examiner alleges that “the decoration of Essig is sufficient to communicate by a symbol, in particular a

butterfly but also the interior marks (14) communicate as they are too a symbol.” A symbol generally represents something that stands for or suggests something else by reason of relationship or association (Merriam Webster Online Dictionary). The butterfly of Essig is merely ornamental and decorative and fails to provide communication. The Examiner further alleges that the interior marks (14), which are mere circles, meet the limitation of providing communication. It is clear that the Examiner’s interpretation is improper as a mere circle, within the ornamental butterfly of Essig, fails to provide communication.

Further, the Examiner alleges that “Essig teaches there is a desire that a decal placed on the body be ornamental to make it nicer for an observer to look at.” (Advisory Action mailed 9/13/05, page 3). In addition, the Examiner alleges that “decals applied to the face or body are more appealing if they contain some decoration thereon, rather than just the black design used in Micchia.” (Advisory Action mailed 9/13/05, page 3). The Examiner’s statements make clear that Essig is purely decorative and fails to provide communication, as required by the claims. By the Examiner’s own statements, the image of Essig is purely decorative and thus, fails to meet the claim limitation of “configured to provide communication.”

The Office Action does not address each and every word recited in claim 21. In particular, the Office Action does not consider the claimed “shape formed within the exterior surface, wherein the shape has a color contrasting to the non-reflective color and is configured to provide communication.” Appellants respectfully submit that in failing to address each and every word of the pending claims, the Office Action does not establish *prima facie* obviousness. See, e.g., M.P.E.P. § 2143.03 (“To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art.”); *In re Wilson*, 424 F.2d 1382, 1385 (CCPA 1970) (“All words in a claim must be considered in judging the patentability of that

claim against the prior art.”). It is well understood that for a proper rejection, all claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 984-85 (C.C.P.A. 1974); *In re Wilson*, 424 F.2d 1382, 1385 (C.C.P.A. 1970) (“All words in a claim must be considered in judging the patentability of that claim against the prior art.”).

D. Independent Claim 31 is Patentable Over Micchia in view of Essig under 35 U.S.C. § 103(a)

Independent claim 31 recites that “a shape or shapes bounded by an exterior boundary or boundaries, or an interior boundary or boundaries, or both, wherein the exterior boundary or boundaries, or the interior boundary or boundaries, or both, is or are configured to provide communication.” The Office Action fails to address these limitations. Further, neither Micchia or Essig discloses or obviates this claimed embodiment of the present invention.

The Examiner acknowledges that Micchia does not disclose that the decal also comprises a shape formed within the exterior surface which has a color contrasting to the non-reflective color and is configured to provide communication (Office Action mailed 6/21/05, page 3 and Advisory Action mailed 9/13/05, page 2). For these major deficiencies, the Office Action applies Essig which discloses a decorative “beauty mark” that releases perfume while the article is being worn and subjected to heat and moisture of the body (Essig, col. 1, lines 9-17).

Essig fails to show the admitted missing limitations, namely “a shape or shapes bounded by an exterior boundary or boundaries, or an interior boundary or boundaries, or both, wherein the exterior boundary or boundaries, or the interior boundary or boundaries, or both, is or are configured to provide communication.” It is the Examiner’s position that “the ornamental material contrasts sufficiently to meet the claim limitation and provides a form of communication.” (page 2, Advisory Action mailed 9/13/05). This is simply untrue. The Examiner has failed to identify the “an exterior boundary or boundaries, or an interior boundary

or boundaries” within the ornamental design of Essig. The Examiner has also failed to identify a “a shape or shapes bounded by an exterior boundary or boundaries, or an interior boundary or boundaries, or both” within the ornamental design of Essig. The Examiner merely identifies a partial ornamental material 14 (*i.e.*, a decorative circle within the butterfly image) and concludes that the ornamental material “contrasts sufficiently to meet the claim limitation.” (Advisory Action mailed 9/13/05, page 2). However, the Examiner has failed to explain how the decorative circle 14 within the butterfly image of Essig meets the limitation reciting “a shape or shapes bounded by an exterior boundary or boundaries, or an interior boundary or boundaries, or both, wherein the exterior boundary or boundaries, or the interior boundary or boundaries, or both, is or are configured to provide communication.”

A major difference between the ornamental design of Essig and the claimed invention is that a shape or shapes bounded by an exterior boundary or boundaries, or an interior boundary or boundaries, or both, in the claimed invention. As detailed in the specification, the embodiment of Figure 7 is typically more functional than the embodiment of Figure 6 since the surrounding area 62 can be dimensioned for optimum functionality for minimizing light reflection into the user’s eyes, whereas the mascot shape per se may or may not properly cover the appropriate reflective portion of the cheeks. (specification, page 12, lines 5-10). This feature is clearly missing from the ornamental design of Essig.

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The Office Action does not address each and every word recited in claim 31. In particular, the Office Action does not consider the claimed “a shape or shapes bounded by an exterior boundary or boundaries, or an interior boundary or boundaries, or both, wherein the exterior boundary or boundaries, or the interior boundary or boundaries, or both, is or are configured to provide communication.” Appellants respectfully submit that in failing to address each and every word of the pending claims, the Office Action does not establish *prima facie* obviousness. *See, e.g.*, M.P.E.P. § 2143.03 (“To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art.”); *In re Wilson*,

424 F.2d 1382, 1385 (CCPA 1970) (“All words in a claim must be considered in judging the patentability of that claim against the prior art.”). It is well understood that for a proper rejection, all claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 984-85 (C.C.P.A. 1974); *In re Wilson*, 424 F.2d 1382, 1385 (C.C.P.A. 1970) (“All words in a claim must be considered in judging the patentability of that claim against the prior art.”).

E. The Combination of Micchia and Essig is Based Purely on Improper Hindsight

The Office Action has failed to provide proper motivation for combining Micchia and Essig. Rather, the Office Action alleges that it would have been obvious to provide the decal of Micchia with a shape formed within the exterior surface which has a color contrasting to the non-reflective color in order to provide communication, “motivated by the fact that Essig ... discloses that where a part of the decal (patch) 4 is to be exposed, it is desirable to impart a particular hue or color [to] the exposed .. part of the decal ... such that the whole surface or only parts of the surface have [sic] ornamental material applied thereto” (Office Action mailed 6/21/05, pages 3-4). Therefore, the alleged “motivation” relied upon by the Office Action for modifying Micchia is because Essig discloses an ornamental decal. This statement of motivation fails for at least the following reasons.

Micchia specifically discloses a light absorbing surface 12 comprising a non-reflective, black, hypo-allergenic coating uniformly applied over the surface of the body sheet 11 (col. 2, lines 37-45). Thus, the surface of Micchia’s patch is uniform and black. The beauty mark invention of Essig contains perfume that is released while the article is being worn and subjected to heat and moisture of the body. There is no reason, absent improper hindsight, for completely modifying the uniform and black patch of Micchia that is applied right under the eye area to

include the ornamental design of Essig, which is filled with perfume and released when subjected to heat and moisture of the body. There is nothing in Essig that would motivate one of ordinary skill in the art to apply the teachings associated with Essig's decal to the invention of Micchia. Essig's decal releases perfume in response to heat and moisture of the body. The eye area releases minimal heat and moisture. Further, it would not be desirable or safe to apply the ornamental decal of Essig that releases perfume under the eye area. The alleged "motivation" relied upon by the Office Action is based purely on hindsight. In fact, the Office Action has failed to provide a proper statement of motivation, but rather relies upon the mere fact that Essig shows an ornamental design applied to a completely different area for a completely different purpose and function.

There is no suggestion to combine the beauty mark of Essig which is worn on the body where heat and moisture release perfume with the device of Micchia which is applied under the eye area. In fact, Micchia specifically teaches that the surface of the patch is uniform and black. The Office Action has failed to rely on any teaching of Essig for the purpose of drastically modifying the patch of Micchia.

The rejections of the independent claims over Micchia and Essig are classic examples of hindsight reconstruction that is contrary to the law. The Office Action has failed to set forth a *prima facie* case of obviousness for the claims. Specifically, when a primary reference is missing elements, the law of obviousness requires that the Office set forth some motivation why one of ordinary skill in the art would have been motivated to modify the primary reference in the exact manner proposed. *Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 664 (Fed. Cir. 2000). In other words, there must be some recognition that the primary reference has a problem and that the proposed modification will solve that exact problem. All of this motivation must come from the

teachings of the prior art to avoid impermissible hindsight looking back at the time of the invention.

In the present case, the Office Action's sole justification for modifying Micchia has absolutely nothing to do with the deficiencies of Micchia. As admitted by the Office Action, Micchia fails to show at least "a shape formed within the exterior surface, wherein the shape has a color contrasting to the non-reflective color and is configured to provide communication." (page 3, Office Action mailed 6/21/05). The Office Action's justification for modifying Micchia is because Essig discloses an ornamental decal (page 3, Office Action mailed 6/21/05). This alleged statement of motivation has absolutely nothing to do with the deficiencies of Micchia. To properly modify Micchia to correct for these major deficiencies, the Office has the burden to show some motivation why providing those elements would have overcome some perceived problem with Micchia. Any such motivation is completely lacking. The Office Action has failed to rely upon any valid teaching in Essig to justify the major modification to Micchia.

Accordingly, the Office Action has failed to provide any proper motivation for modifying Micchia as taught by Essig, so the proposed modification fails. In fact, Micchia and Essig are improperly combined and lack proper motivation. Even if Micchia and Essig could be modified as suggested by the Office Action, the resulting combination would nevertheless fail to show each and every limitation claimed by Applicants. More specifically, any combination of Micchia and Essig could still fail to disclose "a shape formed within the exterior surface, wherein the shape has a color contrasting to the non-reflective color and is configured to provide communication" as well as "a shape or shapes bounded by an exterior boundary or boundaries, or an interior boundary or boundaries, or both, wherein the exterior boundary or boundaries, or the interior boundary or boundaries, or both, is or are configured to provide communication."

The mere fact that Micchia and Essig can be somehow combined and modified does not render the resultant modification obvious unless there is a suggestion or motivation found somewhere in the prior art regarding the desirability of the combination or modification. *See* M.P.E.P § 2143.01; *see also In re Mills*, 16 U.S.P.Q.2d 1430, 1432 (Fed. Cir. 1990); *In re Fritz*, 23 U.S.P.Q.2d 1780 (Fed. Cir. 1992). In addition, the teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in Applicants' disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991).

Therefore, the Office Action has failed to meet its burden. The rejection of independent claims 21 and 31 under 35 U.S.C. § 103(a) should be withdrawn and the claims allowed accordingly.

F. Dependent claims 22-30 and 32-40 are Each Separately Patentable

The remaining claims depend ultimately from independent claims 21 and 31 and, as such, contain the features recited in claims 21 and 31. As discussed above, the proposed combinations fail to suggest or disclose each feature recited in claims 21 and 31 and, therefore, also fails to suggest or disclose at least these same features in the dependent claims. For at least this reason, Appellants respectfully submit that the rejections of the pending claims are improper and request that they be withdrawn. Additionally, these claims are separately patentable over the proposed combination of references for at least the reasons stated below.

The other references cited in the Office Action -- Ross and Humason -- were not cited by the Office Action as teaching or disclosing "a shape formed within the exterior surface, wherein the shape has a color contrasting to the non-reflective color and is configured to provide communication" or "a shape or shapes bounded by an exterior boundary or boundaries, or an

interior boundary or boundaries, or both, wherein the exterior boundary or boundaries, or the interior boundary or boundaries, or both, is or are configured to provide communication” and thus do not make up Micchia and Essig’s deficiencies in that regard. Moreover, Appellants respectfully submit that Ross and Humason -- alone or in combination with the other references - fail to teach or suggest each and every claim recitation of the pending claims.

Claims 22-30 are dependent upon independent claim 21. Claims 32-40 are dependent upon independent claim 31. Thus, since independent claims 21 and 31 should be allowable as discussed above, claims 22-30 and 32-40 should also be allowable at least by virtue of their dependency on independent claims 21 and 31. Moreover, these claims recite additional features which are not claimed, disclosed, or even suggested by the cited references taken either alone or in combination.

1. Claim 22 is Separately Patentable

Claim 22 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein the material is a decal comprising a substrate, having top and bottom faces, the top face of the decal comprising the non-reflective material and the bottom face of the decal having a pressure sensitive adhesive thereon; wherein application of the material comprises applying the bottom face of the decal to the reflective cheek portion and pressing so that the adhesive holds the decal in place.* The Office Action’s rejection of this claim is improper for the reasons set forth above with respect to claim 21. Neither Micchia nor Essig discloses these features. Thus, the combination of Micchia and Essig fails to show each and every limitation of claim 22.

2. Claim 23 is Separately Patentable

Claim 23 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein the non-reflective material has a dull or matte finish and absorbs a substantial*

portion of light in the visible spectrum. The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 21. Neither Micchia nor Essig discloses these features. Thus, the combination of Micchia and Essig fails to show each and every limitation of claim 23.

3. Claim 24 is Separately Patentable

Claim 24 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein the human is a participant in an athletic contest or other event or activity, and wherein application is performed before the start of the athletic contest or other event or activity, so that the material substantially eliminates reflection of incident direct or indirect light off the participant's cheeks into the participant's eyes and removal is practiced after the athletic contest or other event or activity is over.* The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 21. Neither Micchia nor Essig discloses these features. Thus, the combination of Micchia and Essig fails to show each and every limitation of claim 24.

4. Claim 25 is Separately Patentable

Claim 25 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein the material is a temporary tattoo, provided on a substrate, the temporary tattoo provided on a top face of the substrate, the substrate having a bottom face, wherein application is practiced by cleaning a cheek where the temporary tattoo is to be applied, putting the temporary tattoo on the top face of the substrate on the reflective location of the human's cheek to which it is to be applied, wetting the bottom face of the substrate with water and pressing it into contact with the cheek for sufficient time for the temporary tattoo to adhere to the cheek, and sliding or peeling off the substrate from the temporary tattoo.* The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 21. In

addition, Ross and/or Humason fail to make up the deficiencies of the proposed combination. Thus, the combination of Micchia, Essig, Ross and Humason fails to show each and every limitation of claim 25.

5. Claim 26 is Separately Patentable

Claim 26 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein application is practiced to provide as part of the shape, or as the shape or shapes, a sports apparel or equipment manufacturer's or distributor's logo*. The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 21. In addition, Ross fails to make up the deficiencies of the proposed combination. Thus, the combination of Micchia, Essig and Ross fails to show each and every limitation of claim 26.

6. Claim 27 is Separately Patentable

Claim 27 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein application is practiced to provide as part of the shape, or as the shape or shapes, a sports apparel or equipment manufacturer's or distributor's name*. The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 21. In addition, Ross fails to make up the deficiencies of the proposed combination. Thus, the combination of Micchia, Essig and Ross fails to show each and every limitation of claim 27.

7. Claim 28 is Separately Patentable

Claim 28 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein application is practiced to provide as part of the shape, or as the shape or shapes, a logo, a name, a symbol, or a mascot of a school, team, sport, event, company, corporation, geographic region, country, state, person, entity, activity, or organization*. The Office Action's rejection of this claim is improper for the reasons set forth above with respect to

claim 21. In addition, Ross fails to make up the deficiencies of the proposed combination. Thus, the combination of Micchia, Essig and Ross fails to show each and every limitation of claim 28.

8. Claim 29 is Separately Patentable

Claim 29 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein application is practiced to provide as part of the shape, or as the shape or shapes, the name or number of a person or participant in an athletic contest or other event or activity*. The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 21. In addition, Ross fails to make up the deficiencies of the proposed combination. Thus, the combination of Micchia, Essig and Ross fails to show each and every limitation of claim 29.

9. Claim 30 is Separately Patentable

Claim 30 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein application is practiced to provide as part of the shape, or as the shape or shapes, one or more of any of the following: (a) a sports apparel or equipment manufacturer's or distributor's logo; (b) a sports apparel or equipment manufacturer's or distributor's name; (c) a logo, a name, a symbol, or a mascot of a school, team, sport, event, company, corporation, geographic region, country, state, person, entity, activity, or organization; or (d) the name or number of a person or participant in an athletic contest or other event or activity*. The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 21. In addition, Ross fails to make up the deficiencies of the proposed combination. Thus, the combination of Micchia, Essig and Ross fails to show each and every limitation of claim 30.

10. Claim 32 is Separately Patentable

Claim 32 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein the material is a decal comprising a substrate, having top and bottom faces, the*

top face of the decal comprising the non-reflective material and the bottom face of the decal having a pressure sensitive adhesive thereon; wherein application of the material comprises applying the bottom face of the decal to the reflective cheek portion and pressing so that the adhesive holds the decal in place. The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 31. Neither Micchia nor Essig discloses these features. Thus, the combination of Micchia and Essig fails to show each and every limitation of claim 32.

11. Claim 33 is Separately Patentable

Claim 33 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein the non-reflective material has a dull or matte finish and absorbs a substantial portion of light in the visible spectrum.* The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 31. Neither Micchia nor Essig discloses these features. Thus, the combination of Micchia and Essig fails to show each and every limitation of claim 33.

12. Claim 34 is Separately Patentable

Claim 34 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein the human is a participant in an athletic contest or other event or activity, and wherein application is performed before the start of the athletic contest or other event or activity, so that the material substantially eliminates reflection of incident direct or indirect light off the participant's cheeks into the participant's eyes and removal is practiced after the athletic contest or other event or activity is over.* The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 31. Neither Micchia nor Essig discloses these features. Thus, the combination of Micchia and Essig fails to show each and every limitation of claim 34.

13. Claim 35 is Separately Patentable

Claim 35 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein the material is a temporary tattoo, provided on a substrate, the temporary tattoo provided on a top face of the substrate, the substrate having a bottom face, wherein application is practiced by cleaning a cheek where the temporary tattoo is to be applied, putting the temporary tattoo on the top face of the substrate on the reflective location of the human's cheek to which it is to be applied, wetting the bottom face of the substrate with water and pressing it into contact with the cheek for sufficient time for the temporary tattoo to adhere to the cheek, and sliding or peeling off the substrate from the temporary tattoo.* The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 31. In addition, Ross and/or Humason fail to make up the deficiencies of the proposed combination. Thus, the combination of Micchia, Essig, Ross and Humason fails to show each and every limitation of claim 35.

14. Claim 36 is Separately Patentable

Claim 36 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein application is practiced to provide as part of the shape, or as the shape or shapes, a sports apparel or equipment manufacturer's or distributor's logo.* The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 31. In addition, Ross fails to make up the deficiencies of the proposed combination. Thus, the combination of Micchia, Essig and Ross fails to show each and every limitation of claim 36.

15. Claim 37 is Separately Patentable

Claim 37 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein application is practiced to provide as part of the shape, or as the shape or shapes, a sports apparel or equipment manufacturer's or distributor's name.* The Office

Action's rejection of this claim is improper for the reasons set forth above with respect to claim 31. In addition, Ross fails to make up the deficiencies of the proposed combination. Thus, the combination of Micchia, Essig and Ross fails to show each and every limitation of claim 37.

16. Claim 38 is Separately Patentable

Claim 38 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein application is practiced to provide as part of the shape, or as the shape or shapes, a logo, a name, a symbol, or a mascot of a school, team, sport, event, company, corporation, geographic region, country, state, person, entity, activity, or organization.* The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 31. In addition, Ross fails to make up the deficiencies of the proposed combination. Thus, the combination of Micchia, Essig and Ross fails to show each and every limitation of claim 38.

17. Claim 39 is Separately Patentable

Claim 39 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein application is practiced to provide as part of the shape, or as the shape or shapes, the name or number of a person or participant in an athletic contest or other event or activity.* The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 31. In addition, Ross fails to make up the deficiencies of the proposed combination. Thus, the combination of Micchia, Essig and Ross fails to show each and every limitation of claim 39.

18. Claim 40 is Separately Patentable

Claim 40 is separately patentable because the combination of Micchia and Essig fails to disclose *wherein application is practiced to provide as part of the shape, or as the shape or shapes, one or more of any of the following: (a) a sports apparel or equipment manufacturer's or distributor's logo; (b) a sports apparel or equipment manufacturer's or distributor's name;*

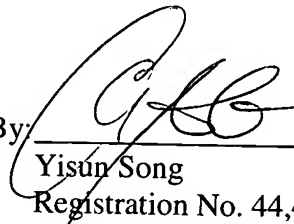
(c) a logo, a name, a symbol, or a mascot of a school, team, sport, event, company, corporation, geographic region, country, state, person, entity, activity, or organization; or (d) the name or number of a person or participant in an athletic contest or other event or activity. The Office Action's rejection of this claim is improper for the reasons set forth above with respect to claim 31. In addition, Ross fails to make up the deficiencies of the proposed combination. Thus, the combination of Micchia, Essig and Ross fails to show each and every limitation of claim 40.

VIII. CONCLUSION

In view of the foregoing, Appellants respectfully request that the Board reverse the prior art rejections set forth in the Office Action and allow all of the pending claims.

Respectfully submitted,

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APPENDIX A - PENDING CLAIMS

CLAIMS

1.-20. (Cancelled)

21. (Original) A method of reducing reflected light glare into a human's eyes from the human's cheeks, the method comprising the steps of:

applying underneath the human's eyes, on the human's cheeks, generally covering a location at which incident direct or indirect light is likely to be reflected in the human's eyes, a non-toxic material having a non-reflective colored and finished exterior surface having a wavelength falling outside of the range of wavelengths between 430 nm and 690 nm, and a shape formed within the exterior surface, wherein the shape has a color contrasting to the non-reflective color and is configured to provide communication, and wherein the non-toxic material comprises one of a decal and a temporary tattoo; and

removing the non-reflective material within a week after application of the non-reflective material.

22. (Original) The method according to claim 21, wherein the material is a decal comprising a substrate, having top and bottom faces, the top face of the decal comprising the non-reflective material and the bottom face of the decal having a pressure sensitive adhesive thereon; wherein application of the material comprises applying the bottom face of the decal to the reflective cheek portion and pressing so that the adhesive holds the decal in place.

23. (Previously Presented) The method of claim 21, wherein the non-reflective material has a dull or matte finish and absorbs a substantial portion of light in the visible spectrum.

24. (Previously Presented) The method of claim 21, wherein the human is a participant in an athletic contest or other event or activity, and wherein application is performed before the start of the athletic contest or other event or activity, so that the material substantially eliminates reflection of incident direct or indirect light off the participant's cheeks into the participant's eyes and removal is practiced after the athletic contest or other event or activity is over.

25. (Previously Presented) The method of claim 21, wherein the material is a temporary tattoo, provided on a substrate, the temporary tattoo provided on a top face of the substrate, the substrate having a bottom face, wherein application is practiced by cleaning a cheek where the temporary tattoo is to be applied, putting the temporary tattoo on the top face of the substrate on the reflective location of the human's cheek to which it is to be applied, wetting the bottom face of the substrate with water and pressing it into contact with the cheek for sufficient time for the temporary tattoo to adhere to the cheek, and sliding or peeling off the substrate from the temporary tattoo.

26. (Previously Presented) The method of claim 21, wherein application is practiced to provide as part of the shape, or as the shape or shapes, a sports apparel or equipment manufacturer's or distributor's logo.

27. (Previously Presented) The method of claim 21, wherein application is practiced to provide as part of the shape, or as the shape or shapes, a sports apparel or equipment manufacturer's or distributor's name.

28. (Previously Presented) The method of claim 21, wherein application is practiced to provide as part of the shape, or as the shape or shapes, a logo, a name, a symbol, or a mascot

of a school, team, sport, event, company, corporation, geographic region, country, state, person, entity, activity, or organization.

29. (Previously Presented) The method of claim 21, wherein application is practiced to provide as part of the shape, or as the shape or shapes, the name or number of a person or participant in an athletic contest or other event or activity.

30. (Previously Presented) The method of claim 21, wherein application is practiced to provide as part of the shape, or as the shape or shapes, one or more of any of the following:

- (a) a sports apparel or equipment manufacturer's or distributor's logo;
- (b) a sports apparel or equipment manufacturer's or distributor's name;
- (c) a logo, a name, a symbol, or a mascot of a school, team, sport, event, company, corporation, geographic region, country, state, person, entity, activity, or organization; or
- (d) the name or number of a person or participant in an athletic contest or other event or activity.

31. (Previously Presented) A method of reducing reflected light glare into a human's eyes from the human's cheeks, the method comprising the steps of:

applying underneath the human's eyes, on the human's cheeks, generally covering a location at which incident direct or indirect light is likely to be reflected in the human's eyes, a non-toxic material having a non-reflective colored and finished exterior surface having a wavelength falling outside of the range of wavelengths between 430 nm and 690 nm, and a shape or shapes bounded by an exterior boundary or boundaries, or an interior boundary or boundaries, or both, wherein the exterior boundary or boundaries, or the interior boundary or boundaries, or both, is or are configured to provide communication, and wherein the non-toxic material comprises one of a decal and a temporary tattoo; and

removing the non-reflective material within a week after application of the non-reflective material.

32. (Previously Presented) The method according to claim 31, wherein the material is a decal comprising a substrate, having top and bottom faces, the top face of the decal comprising the non-reflective material and the bottom face of the decal having a pressure sensitive adhesive thereon; wherein application of the material comprises applying the bottom face of the decal to the reflective cheek portion and pressing so that the adhesive holds the decal in place.

33. (Previously Presented) The method of claim 31, wherein the non-reflective material has a dull or matte finish and absorbs a substantial portion of light in the visible spectrum.

34. (Previously Presented) The method of claim 31, wherein the human is a participant in an athletic contest or other event or activity, and wherein application is performed before the start of the athletic contest or other event or activity, so that the material substantially eliminates reflection of incident direct or indirect light off the participant's cheeks into the participant's eyes and removal is practiced after the athletic contest or other event or activity is over.

35. (Previously Presented) The method of claim 31, wherein the material is a temporary tattoo, provided on a substrate, the temporary tattoo provided on a top face of the substrate, the substrate having a bottom face, wherein application is practiced by cleaning a cheek where the temporary tattoo is to be applied, putting the temporary tattoo on the top face of the substrate on the reflective location of the human's cheek to which it is to be applied, wetting the bottom face of the substrate with water and pressing it into contact with the cheek for

sufficient time for the temporary tattoo to adhere to the cheek, and sliding or peeling off the substrate from the temporary tattoo.

36. (Previously Presented) The method of claim 31, wherein application is practiced to provide as part of the shape, or as the shape or shapes, a sports apparel or equipment manufacturer's or distributor's logo.

37. (Previously Presented) The method of claim 31, wherein application is practiced to provide as part of the shape, or as the shape or shapes, a sports apparel or equipment manufacturer's or distributor's name.

38. (Previously Presented) The method of claim 31, wherein application is practiced to provide as part of the shape, or as the shape or shapes, a logo, a name, a symbol, or a mascot of a school, team, sport, event, company, corporation, geographic region, country, state, person, entity, activity, or organization.

39. (Previously Presented) The method of claim 31, wherein application is practiced to provide as part of the shape, or as the shape or shapes, the name or number of a person or participant in an athletic contest or other event or activity.

40. (Previously Presented) The method of claim 31, wherein application is practiced to provide as part of the shape, or as the shape or shapes, one or more of any of the following:

- (a) a sports apparel or equipment manufacturer's or distributor's logo;
- (b) a sports apparel or equipment manufacturer's or distributor's name;
- (c) a logo, a name, a symbol, or a mascot of a school, team, sport, event, company, corporation, geographic region, country, state, person, entity, activity, or organization; or
- (d) the name or number of a person or participant in an athletic contest or other event or activity.

41.-47. (Cancelled)

APPENDIX B - EVIDENCE

None

APPENDIX C - RELATED PROCEEDINGS

None